WALTER and SUSAN OLSON, Appellants	:	Order Reversing Assessment of Trespass Damages
v.	:	
	:	Docket No. IBIA 95-109-A
PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee	:	June 25, 1997

Appellants Walter and Susan Olson seek review of a May 23, 1995, decision issued by the Portland Area Director, Bureau of Indian Affairs (Area Director; BIA), assessing trespass damages against them in the amount of $193,270 for their use of a portion of Flathead Allotment 2020 over a six-year period. For the reasons discussed below, the Board of Indian Appeals (Board) reverses the assessment of trespass damages against Appellants.

Appellants submitted several documents with their Opening Brief. The Area Director has moved to strike all these documents, arguing that Appellants failed to file a timely objection to the administrative record under 43 C.F.R. § 4.336, which provides that "[a]ny objection to the record as constituted shall be filed with the Board within 15 days of receipt of the notice of docketing."

Under 43 C.F.R. § 4.335(a), the BIA deciding official is required to transmit the administrative record to the Board. The regulation provides that the administrative record "include[s], without limitation, copies of transcripts of testimony taken; all original documents, petitions, or applications by which the proceeding was initiated; all supplemental documents which set forth claims of interested parties; and all documents upon which all previous decisions were based." Section 4.335(b)(3) further requires the deciding official to certify "that the record contains all information and documents utilized by the deciding official in rendering the decision appealed."

Appellants do not contend that the Area Director failed to submit to the Board documents which he considered in reaching his decision, or submitted documents on which he did not rely. Either of these allegations would fall within 43 C.F.R. § 4.336. Instead, Appellants submitted additional documents which the Area Director apparently did not consider.

In a few cases in which attorneys have engaged in an extreme motions practice, the Board has used 43 C.F.R. § 4.336 in addressing the filing of additional documents. However, the Board's normal practice is to allow the parties to supplement the record provided by the deciding official as long as opposing parties have the opportunity to respond to any documents submitted. This practice includes allowing the BIA deciding official to submit

additional documents, even though this is arguably an admission that those documents should have been considered in reaching the decision.

The Area Director had the opportunity in his Answer Brief to respond to, or comment on, the documents Appellants submitted. The Area Director's motion to strike all of the documents submitted with Appellants' Opening Brief is denied.

The Area Director additionally contends that the Board should strike two specific documents which he alleges are privileged under the Freedom of Information Act, 5 U.S.C. § 552 (1994) (FOIA), and implementing regulations in 43 C.F.R. § 2.13. The Area Director argues that these documents are exempt from disclosure under FOIA exemption 5, as either attorney-client or deliberative process communications, and were improperly released to Appellants by someone associated with the Confederated Salish and Kootenai Tribes (Tribes). The Tribes had access to these documents pursuant to its performance of BIA realty functions under an Indian Self-Determination Act (ISDA) contract.

In reaching its decision in this appeal, the Board has not considered the two documents to which the Area Director objects. To the extent that this action constitutes a tacit granting of the Area Director's motion, the motion is granted.

The following discussion includes information drawn from the documents Appellants submitted with their Opening Brief, other than the two documents just discussed.

Allotment 2020 is located near the town of Elmo, Montana, and contains 74.87 acres, more or less. According to a 1993 appraisal report, the allotment is divided by a highway into a north section containing approximately 15.82 acres and a south section containing approximately 53 acres. The highway right-of-way encompasses approximately 6.05 acres. The north section of the allotment has a frontage of approximately 1,380 feet along Flathead Lake.

It appears that Appellants, or at least Walter Olson, first began renting a house on Allotment 2020 in 1975. The house was the sole property of Mary Caye, who also owned an undivided 3/4 interest in Allotment 2020. The remaining undivided 1/4 interest in Allotment 2020 was owned by approximately 38 individuals.

The first lease of the house was prepared and executed by the Acting Superintendent, Flathead Agency, BIA (Superintendent), on July 12, 1976, but took effect retroactively as of November 15, 1975. BIA Business Lease 4864 stated that it covered the house belonging to Mary. It did not mention the leasing of any part of the land comprising Allotment 2020. Rent was set at $25 per month for the one year term of the lease.

Mary Caye died on October 5, 1976. Administrative Law Judge David J. McKee disapproved Mary's will on the grounds that the devisee, her husband Peter, had predeceased her. Judge McKee found that Mary had no surviving

lineal descendant who came within the anti-lapse provisions of 43 C.F.R. § 4.261, and therefore ordered her estate to be distributed to her niece, Jean Sustine Morigeau Mullen, under the Montana laws of intestate succession. Although that decision was appealed and was remanded for further consideration, Estate of Mary Martin Mataes Andrew Caye, 9 IBIA 196 (1982), no one involved with this case has disputed that Jean ultimately inherited Mary's 3/4 interest in Allotment 2020, and her full interest in the house.

On November 19, 1979, Jean's attorney wrote to the Superintendent, stating, inter alia: "Recently Mrs. Mullen received * * * [a] lease from your agency for the rental of the house and yard." 1/ On November 27, 1979, the Agency Acting Natural Resource Officer (Natural Resource Officer) responded to the attorney's letter, stating: "Walter Olson leases an old house, which is in such shape that normally it would not be leaseable, on this property and pays $25.00 per month, or yearly rental of $300.00."

On December 10, 1979, the Natural Resource Officer wrote to Jean:

> This is to notify you that the Superintendent of Flathead Agency, will no longer manage the leasing of your house in Elmo, Montana.
>
> When an estate has been probated the Superintendent prefers to turn the leasing responsibility over to the new land owner, when they are competent and can manage their own affairs.
>
> The lease that was prepared to Walter C. Olson by this office will be considered null and void. It will therefore be necessary for you to draw up a general lease agreement with Mr. Olson. You may prefer the assistance of your attorney to prepare a new lease contract with Mr. Olson.
>
> A copy of this letter is being sent to Mr. Olson to advise him of the situation.

Pursuant to this letter, Jean negotiated a lease with Walter. The lease purports to rent the "house and yard" on Allotment 2020 for a term of five years, beginning January 1, 1980. The lease states that the low rental payment of $25 per month was in consideration of Walter's maintenance, repair, and protection of the property. The lease was not approved by BIA. On January 30, 1980, Jean wrote to the Natural Resource Officer, stating:

> I have already negotiated a lease with Mr. Olson on the small house in Elmo, and will be dealing with him directly, receiving the monthly rent directly. Regarding this negotiation you indicated to my daughter you would check on the fact that the small

1/ Because the Board did not find a copy of this lease document in the materials before it, it was unable to verify the statement that it purported to lease the house "and yard."

house was owned by Mary Caye exclusively and that she alone received rental monies on said house. This is considered private property and therefore I understand the rental fee I am receiving from Mr. Olson is also exclusively mine.

In a February 14, 1980, letter to Jean, the Natural Resource Officer replied:

> This office cannot officially affirm the ownership of the home. It has been a general understanding that the house did belong to Mary Caye: that she in fact sold some timber and had the home built in the fifties. You can write to Madeline P. Couture, Box 32, Elmo, Mr 39915, and she can verify this fact. [2/]

Apparently Susan Olson also wrote to the Agency with concerns about either the lease or the ownership of the house. The Board did not find a copy of Susan's letter in the materials before it. However, the Superintendent responded on May 23, 1980, stating:

> In reply to your letter of May 9, we understand your concern. The [BIA] does recognize the lease you have with Mrs. Mullen even though it was negotiated outside this office. The house was considered personal property owned by Mary M. Caye at the time of her death and was passed on to her legal heir at law.

In May 1983, Jean authorized Appellants to move a trailer onto the leased premises. In March 1986, she entered into a second lease of the house and yard with Appellants. This lease, which increased the rent to $40 per month, covered a 20-year period beginning on April 1, 1986. Neither of these documents was approved by BIA.

From information presented during this appeal, Jean died in April 1986. No party here has disputed the assertion that Jean's 3/4 interest in Allotment 2020 is now owned by Carolyn Jean Mullen O'Leary (2/3 of 3/4); Dorothy Jean O'Leary, (1/6 of 3/4); and Margaret Anne O'Leary Falck (1/6 of 3/4). Although it is not totally clear, it appears that the house is owned by Carolyn, Dorothy, and/or Margaret.

Apparently the first problem with the lease arrangement arose in late 1993, when one of the co-owners of Allotment 2020 approached the Tribes with an offer to sell an undivided interest in the allotment. A Tribal appraiser appraised the allotment under the Tribes' ISDA contract. During a physical examination of the allotment, the appraiser discovered Appellants' presence and improvements, and stated in his report that Appellants were using about 3.75 acres of the allotment as a homesite. The appraisal concluded that

> [s]imilar properties, like the portion north of the highway, are used for waterfront recreation, homes, or investment properties.

2/ Nothing in the materials before the Board indicates who Madeline Couture is or why she would have information that BIA did not have.

> The land south of the highway would be a secondary consideration and could include a variety of uses such as farming, livestock grazing and a variety of recreation uses. A typical purchaser would view the north portion as the primary tract for investment with the south portion considered as excess acreage. After considering the subject and surrounding similar properties, the highest and best use is lakeshore investment with excess acreage.

Appraisal at 3. The appraiser determined that, as of October 18, 1993, the fair market value of the north portion of Allotment 2020 was $684,940, the fair market value of the excess acreage in the south portion of the allotment was $47,965, and the 6.05 acres comprising the highway right-of-way had no value. He thus determined a total fair market value of $732,905, which he rounded to $733,000.

On December 1, 1993, the Manager of the Tribes' Division of Lands wrote Appellants. He stated that the Tribes had just learned of Appellants' presence on the allotment and indicated that they should submit any evidence they had concerning their right of occupancy. He further stated that official action would be taken by the Superintendent.

Appellants responded on December 17, 1993, providing, inter alia, copies of the documents referenced above.

The Superintendent notified Appellants that their lease was invalid and they were therefore in trespass on the allotment. Appellants appealed this decision to the Area Director, who affirmed it on September 23, 1994. The Area Director stated:

> Due to the workload experienced at the Agencies, and because of the desire to make Indian owners more knowledgeable about realty matters, owners are often encouraged to negotiate their own leases. However, such a lease is not valid unless all of the owners have consented (either directly or, after attempting to get all of the owners consent, through authority delegated to the Superintendent to approve on behalf of the non-consenting heirs, incompetent owners, minors, etc.) **and** approved by [BIA]. None of the "leases" you have furnished were approved by the BIA. Your 1986 "lease" was never submitted to the BIA for approval. The pertinent section is found in Title 25 of the Code of Federal Regulations, Part 162.5(a). This part states:
>
> > All leases made pursuant to the regulations in this part shall be in the form approved by the Secretary and subject to his written approval.
>
> The approval of the Secretary (delegated to the Superintendent) is necessary to ensure that adequate rent is paid, that the lease contains all of the provisions required by the regulations, and to ensure that all owners of the property are part of the lease agreement. The copies of the leases which you provided as part of your appeal only indicate Jean Mullen as the lessor, even

though she only held a 3/4 interest in the property. Apparently none of the other owners ever received any rental payments.

Sept. 23, 1994, Decision at 3-4. The Area Director continued:

> We do not know the full intent of [the Natural Resource Officer's] December 10, 1979, letter advising that Ms. Mullen would have to draw up a general lease agreement. He does not indicate whether he believed that Secretarial approval was required. However, the regulations are clear that Secretarial approval of the lease document and of the lease itself is required. The March 17, 1986, document which you presented as a "lease" of Allotment 2020 has not been approved by the Secretary. Additionally, the "lease" was not negotiated with all 39 owners of the property, nor was it endorsed by them. The "lease" also does not provide any compensation to the undivided owners of the property other than Ms. Mullen. The record also does not reflect that a fair market rental value for the land was ever determined. Your previous attempt in 1979 at getting the approval would seem to acknowledge your understanding of the need for the approval. Apparently you made no effort to obtain BIA approval of the 1986 "lease."

Sept. 23, 1994, Decision at 4. Although advised of the right to do so, Appellants did not appeal from this decision. Instead, they moved off the property.

On August 1, 1994, the Tribal appraiser prepared an estimate of the fair annual rental for the 3.75 acres of Allotment 2020 which Appellants allegedly were using. The appraiser determined that the fair market value of this portion of the allotment was $207,000 as of July 1, 1988, and was $297,000 as of July 1, 1994. He applied a ten percent rate of return to the fair market value in determining that the fair annual rental was $20,700 as of July 1, 1988, and $29,700 as of July 1, 1994. From these starting points he prepared two options for determining the fair annual rental for the six-year period from 1988 through 1994. Option 1 applied the increase in the National Consumer Price Index-U to increase the value of the portion of the allotment each year. This option produced a total rental over the six-year period of $185,612. Option 2 determined that the fair market value of the property increased an average $15,000 each year between 1988 and 1994, and added this amount to the fair market value each intermediate year. This option produced a total rental of $193,270.

On August 8, 1994, the Superintendent notified Appellants that they were being assessed trespass damages:

> This letter constitutes my notice to you, on behalf of Indian owners of Allotment 2020, for damages resulting from your occupation of Allotment 2020. The determination of damages will be based upon the fair market rental value of the approximate four acres which you occupy/use. Under the federal statute of limitation, 28 U.S.C. Part 2415, damages may be collected for the last six years and 90 days of your occupancy. The fair market rental

value of the approximate 4 acre tract you have occupied for the last six years and 90 days amounts to $193,270.00.

Appellants appealed to the Area Director, who issued the decision now under appeal on May 23, 1995. Concluding that most of Appellants' arguments attacked the September 23, 1994, trespass decision, the Area Director held that that decision was final for the Department based on Appellants' failure to appeal from it. The Area Director affirmed the Superintendent's assessment of trespass damages.

Appellants appealed this decision. After Appellants filed their Opening Brief, Carolyn, Dorothy, and Margaret sought to participate in this case as amicus curiae. Although the Area Director moved to limit their right to participate, in an order dated August 9, 1995, the Board held that, as co-owners of the property at issue, these individuals were already full parties to this proceeding.

Based upon an initial review of the administrative record; Appellants' Opening Brief; and the motion filed by Carolyn, Dorothy, and Margaret, the Board requested that the parties attempt to resolve this matter and stayed further proceedings before it pending settlement negotiations. The stay was continued several tines before the Board concluded that no settlement would be reached. At that time, it allowed Appellants an opportunity to supplement their Opening Brief. Appellants did not do so. The Area Director filed an Answer Brief. Appellants did not file a reply brief. Carolyn, Dorothy, and Margaret did not file a brief.

As they did before the Area Director, Appellants devote much of their Opening Brief to a discussion of whether they were properly found to be in trespass on Allotment 2020. The Area Director has filed a motion to dismiss those portions of Appellants, appeal in which they seek to relitigate the trespass question. The Board treats this motion as an argument that it should not consider these portions of Appellants' argument.

Although they were notified of their right to appeal the trespass decision, Appellants failed to do so. Therefore, the decision that Appellants were in trespass on Allotment 2020 is final for the Department and will not be reconsidered here. See 25 C.F.R. § 2.6(b) ("Decisions made by officials of the [BIA] shall be effective when the time for filing a notice of appeal has expired and no notice of appeal has been filed"); American Land Development Corp. v. Acting Phoenix Area Director, 26 IBIA 197 (1994).

Concerning the assessment of trespass damages, the Area Director argues that he properly based his decision on the appraisals, and that Appellants have failed to show any error in the appraisal methodology or to present a differing appraisal. In support of this argument, the Area Director cites White Mountain Apache Tribe v. Deputy Assistant Secretary--Indian Affairs, 17 IBIA 258, 267 (1989).

Appellants argue that: (1) although the Tribes' Division of Lands has indicated that 1.5 acres is a more realistic estimate of the amount of land

Appellants used, the assessment was based on 3.75 acres; (2) BIA has seldom realized more than a 1.5 to 2 percent return on Flathead Reservation lands and, other than the Kerr Dam Hydro site, there are no records of land leases on the Reservation valued at the amounts they are being assessed; (3) fair market value cannot be based on a straight percentage calculation, but must be based on the agreement between a willing buyer and a willing seller; and (4) some of Jean's heirs stated they would sign waivers relinquishing their interest in any past due rents.

The Board finds that, under the circumstances of this case, it is not necessary for it to determine whether the Area Director properly calculated the amount of damages, because it concludes that the assessment of damages against Appellants would constitute a manifest injustice. Under 43 C.F.R. § 4.318, "the Board shall not be limited in its scope of review and may exercise the inherent authority of the Secretary to correct a manifest injustice or error where appropriate."

As noted above, in February 1980, IBIA notified Jean that it could not "officially affirm the ownership" of the house, but stated that it thought Mary had sold timber and had the house built. The letter gives no indication as to whether the timber sold was trust property or whether the house was built with the timber that was sold, with the proceeds of the timber sale, or perhaps with other monies. In essence, BIA admitted in this letter that it did not know if the house was trust real property, trust personal property, or non-trust property.

The Board is fully aware that there have been and continue to be questions concerning the status of particular houses built on trust property. However, BIA either had authority to lease this house or it did not, based on whether the house was or was not trust real property. In leasing the house in 1975/1976, BIA implicitly held that it was trust real property which BIA had authority to lease. In declining to be further involved in leasing the house in 1979, BIA did not discuss the status of the house or whether BIA had authority to lease it, but stated only that "the Superintendent prefers to turn the leasing responsibility over to the new land owner, when they are competent and can manage their own affairs." If the house was trust real property, BIA was required by statute to be involved in its leasing, regardless of whether the new owner was or was not "competent." Accordingly, BIA erred either in 1975/1976 by leasing personal or non-trust property, or in 1979 by declining to be involved in the leasing of trust real property.

Whether or not it had authority to lease the house in 1975/1976, BIA prepared and executed a document which purported to cover the "Rental of house belonging to Mary Mateas Caye located * * * on Allotment No. 2020." Nothing in the BIA lease refers to the leasing of any land underlying or surrounding the house, or the granting of any access right-of-way to the house. There is no evidence that another lease existed covering lands within the allotment, and BIA has not suggested that such a lease existed. When it prepared and executed this lease, BIA knew or should have known

that the owner of the house held only an undivided interest in the allotment. The Board sincerely doubts that the intention in leasing the house was that the lessee would have access to the leased premises only by helicopter landing on the house's roof, would not be able to step outside without trespassing on Allotment 2020, and in fact would be in trespass at all times because the house was sitting on Allotment 2020. This, however, is precisely the situation which BIA created in preparing and executing the 1975/1976 lease.

Whether or not it had authority to decline to be involved in leasing the house, in 1979 BIA turned the leasing of the house over to Jean. Even though it had at least two clear opportunities to do so, BIA did not inform either Jean or Appellants that the house could not be leased without also leasing a portion of the allotment. Neither the Natural Resource Officer's December 10, 1979, letter to Jean, nor the Superintendent's May 23, 1980, letter to Susan, even intimated that there was a problem with leasing the house without also leasing the land in the allotment, or that BIA approval was required for any part of the transaction. Furthermore, nothing in the letters indicates that BIA had merely turned the "negotiation" of a lease over to Jean, while retaining authority to approve any resulting lease.

To add to the problem, Appellants have submitted documents which show Jean was seeking information and assistance from BIA precisely because she did not understand the ramifications of owning trust property. As an Indian owner of trust property, Jean was a person to whom BIA owed a trust responsibility in regard to her trust property. However, BIA, as Jean's trustee, essentially left her on her own. Jean's trustee told her that she was responsible for leasing the house, and said nothing that would alert her to any problems associated with the multiple ownership of the land on which the house was located.

Although a lawyer could argue that Appellants and/or Jean should have known the difference between leasing the house and leasing the land underlying and surrounding the house, there is no evidence that BIA understood this distinction when it prepared and executed the 1975/1976 lease. The Board declines to hold an individual to whom BIA owes a trust responsibility to a higher standard than that which BIA demonstrated when acting in its capacity as trustee.

The Board concludes that assessing trespass damages against Appellants under the circumstances of this case would constitute a manifest injustice because neither Appellants nor Jean were responsible for the situation that resulted in Appellants' trespass on Allotment 2020. That situation was created by BIA's initial preparation and execution of a lease of the house without a lease of the underlying and surrounding land, and its later failure to provide either Jean or Appellants with appropriate information concerning the leasing of the house vis-a-vis the leasing of the allotment. If such information had been provided when it was requested, the parties could have made an informed decision as to whether they wanted to continue to attempt to lease the house at a time when any trespass could have been avoided.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Portland Area Director's May 23, 1995, decision assessing trespass damages against Appellants is reversed. 3/

Kathryn A. Lynn
Chief Administrative Judge

Anita Vogt
Administrative Judge

3/ Any outstanding motions not addressed in this decision are denied.